No. 95-7452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LYNCE,
Petitioner,
v.
HAMILTON MATHIS, ROBERT A. BUTTERWORTH, and HARRY K. SINGLETARY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

Of Counsel:
CARTER G. PHILLIPS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

H. JAY STEVENS
JOEL T. REMLAND *
Federal Public Defender
Middle District of Florida
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338
Counsel for Petitioner

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

STATUTES

REPLY BRIEF OF PETITIONER

Respondents' primary argument in support of their retroactive withdrawal of Petitioner's early release credits is that the initial award of release credits was contingent and uncertain. That argument fails entirely to address the ex post facto issue presented in this case. It is undisputed that Respondents in fact *did* lawfully award early release credits to Petitioner. Given that fact, retrospective assessment of Petitioner's odds of receiving credits in the first instance is moot and irrelevant. Rather, the question presented in this Petition is whether the retroactive change in the duration of Petitioner's incarceration effected by the 1992 Act violates the constitutional prohibition on ex post facto laws.

Respondents raise in their opposition brief for the first time a new state statutory interpretation argument. In accordance with its general practice, the Court should not consider this argument. Regardless, Respondents' belated state law argument has already been resolved by the Florida Supreme Court.

Effectively, Respondents ask the Court to create a new "overcrowding" exception to the Ex Post Facto Clause. Such an erosion of a bulwark against arbitrary and vindictive government deprivations of liberty is particularly inappropriate under these circumstances. Prison "overcrowding" is a crisis of the government's own making, which it could readily resolve without resort to unconstitutional measures.

Petitioner does not seek to curtail Florida's power to respond to crime as it sees fit or to change the punishment prescribed for crimes, so long as any punishment changes operate prospectively. Consistent with the Ex Post Facto Clause, Florida could repeal prospectively all early release gain-time mechanisms. What the Ex Post Facto Clause prohibits is the change effected by the 1992 Act: a retroactive increase in the quantum of punishment prescribed for a crime, based solely on Petitioner's offense of conviction.

I. RESPONDENTS' PRINCIPAL ARGUMENT RESTS ON A FUNDAMENTAL MISAPPREHENSION OF EX POST FACTO LAW AND WHAT IS AT ISSUE IN THIS CASE.

The majority of Respondents' argument focuses on the question of whether the overcrowding gain-time statutes in place from 1985 to 1991 were sufficient to allow Petitioner to form a reasonable, definite expectation of reduced incarceration time. Mathis Br. 17-30; Butterworth Br. 15-25. Respondents' second general argument is related, and centers on the state's reasons for creating overcrowding credits. *See* Mathis Br. 2-9; Butterworth Br. 2-9. Both of those questions are irrelevant to the issue in this case: whether the 1992 Florida statute that retroactively increased the duration of Petitioner's incarceration—based solely on his offense of conviction—violated the Ex Post Facto Clause.

A. Respondents' argument that, at the time of Petitioner's offense, the future award of overcrowding credits was speculative and contingent is not only irrelevant, it misunderstands fundamentally the Ex Post Facto inquiry. Petitioner is challenging the 1992 Act's retroactive *revocation* of *actually awarded* provisional release credits. Respondents' arguments regarding the contingent nature of the *award* of overcrowding gain-time credits under the statutes in effect from 1985 to 1991 are misplaced because Petitioner is not challenging those statutes or the pre-conditions they placed on the award of gain-time credits.[1] The Ex Post Facto Clause has no application to changes in penal laws that operate prospectively, like the prison overcrowding condition precedent to the award of overcrowding gain time. What the Ex Post Facto Clause prohibits—and what Petitioner challenges here—is a retroactive increase in the punishment prescribed for a crime.

[1] In all events, arguments regarding whether the award of provisional release credits was speculative at some point in time are now moot. All parties agree that Petitioner actually received 1860 days of those credits.

Under *Morales*, the test is whether the statute that canceled retroactively Petitioner's previously awarded early release credits—the 1992 Act—"produce[d] a sufficient risk of increasing the measure of punishment attached" to Lynce's crime. *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1603 (1995). The circumstances of this case are quite different from those in *Morales*, where there was a real question regarding what effect, if any, the challenged statute would have on the duration of the prisoner's incarceration. *See id.* at 1597-98.[2] Here, there is no question that the challenged statute—the 1992 Act—as applied, retroactively increased the duration of Petitioner's incarceration. Petitioner was released unconditionally in October 1992, and reincarcerated for his original offense in June 1993, pursuant to the 1992 Act. The "risk" of increased incarceration due to the 1992 Act was an absolute 100% certainty. Florida law as it existed prior to the 1992 Act mandated that the Department of Corrections release Petitioner in October 1992. *See* II *infra*. As a result of the 1992 Act, Petitioner was forced to spend more than five additional years

[2] In *Morales*, the statute at issue reduced the frequency of parole hearings for certain offenders. Morales challenged the statute, claiming that it reduced the likelihood that he would receive parole, and thus increased his punishment. *Morales*, 115 S. Ct. at 1602-03. The prisoner in *Morales* had not yet been awarded parole, so the Court conducted an inquiry into the likelihood that the reduced frequency of parole hearings would actually diminish his prospects for early release on parole. It was in this context that the Court found the challenged statute created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Id.* at 1603. By contrast, at the time of the 1992 Act, Mr. Lynce had already received Florida's analog to a parole date, a mandatory release date determined by the award of early release gain-time. *See* § 921.001(10), Fla. Stat. (Supp. 1992). The determination of his mandatory release date required no speculation or prognostication whatsoever. If Morales had already been granted parole and the challenged statute revoked that parole—and all future eligibility for parole—based solely on his offense of conviction, looking backward to determine his likelihood of obtaining parole in the first instance would have been a pointless exercise.

in prison.[3] The only question in this case is whether that retroactive increase in Petitioner's term of incarceration is consistent with the requirements of the Ex Post Facto Clause. Respondents' attempt to reconstruct the likelihood of an overcrowding gain-time award in the period prior to its actual award is an irrelevant distraction.

B. Florida's motivation for enacting overcrowding release credit statutes is similarly irrelevant. Florida has the power and the authority to prescribe the penalties for violations of state law, so long as those prescriptions operate prospectively. The state's motivation for creating or revising prison sentences, sentencing systems and determinants of the duration of prison time in the first instance has no bearing on whether the retroactive increase in the punishment for selected offenses as a result of the 1992 Act violates the Ex Post Facto Clause.[4]

II. THE 1992 ACT'S REVOCATION OF PETITIONER'S EARLY RELEASE GAIN-TIME CREDITS RETROACTIVELY INCREASED HIS PUNISHMENT BY INCREASING THE LENGTH OF HIS INCARCERATION.

Respondents argue that Petitioner's additional five years' incarceration for the same offense did not consti-

[3] There is no dispute that the 1992 Act, as applied, was retroactive. *See* Mathis Br. 34-37.

[4] Assume, for example that a state enacted a law effective January 1, 1986 providing that a certain crime should be punished by a penalty of no more than five years. Further assume that the enacting legislature believed that the severity of that crime actually warranted a 10-year sentence, but that because of prison population and fiscal resource constraints, it was necessary to prescribe a five-year sentence. Finally, assume a person is convicted of that crime in 1986 and sentenced to five years in prison. If the state increased retroactively the penalty for the prisoner's crime to ten years in 1991, the fact that the five-year sentence prescribed at the time of the offense was motivated in part by overcrowding concerns would be entirely irrelevant to an Ex Post Facto challenge. Similarly, the fact that Florida's motivation in enacting various types of gain-time was to respond to prison overcrowding is irrelevant to the question of whether it may retroactively revoke those credits once they have been awarded.

tute increased punishment because the award of overcrowding gain-time credits was discretionary in the first instance. Mathis Br. 30-34. This argument proves too much. Ultimately, the use of every type of early release gain-time in Florida is discretionary, as are parole decisions in states retaining a parole system.[5] Following Respondents' argument, the government could abolish retroactively all gain-time, or retroactively abolish parole, without implicating the Ex Post Facto Clause. The clear import of *Morales* is that the government may not retroactively *abolish* parole (or parole eligibility) or mechanisms providing for early release—if the government constitutionally could abolish parole retroactively for certain offenders, *a fortiori* the government could enact a statute that unambiguously made it substantially less likely that those offenders would be granted parole. *See Morales*, 115 S. Ct. 1597 (addressing degree of likelihood of effect

[5] Respondents' attempts to make technical distinctions between different types of gain-time based on a discretionary/mandatory distinction are unavailing. The Florida Supreme Court has expressly held that basic gain-time, which Respondent Mathis characterizes as "automatic" and "mandatory," is ultimately discretionary. *Waldrup* v. *Dugger*, 562 So. 2d 687 (1990). As they must in light of *Weaver* v. *Graham*, 450 U.S. 24 (1981), Respondents concede that basic gain-time is a determinant of punishment, and its retroactive revocation a violation of the Ex Post Facto Clause. Although Respondent Mathis attempts to distinguish between "gain-time" and overcrowding early release "credits," the Florida Legislature did not draw such fine distinctions. *See* § 944.276, Fla. Stat. (1987) (Lodg. Doc. 17) ("Administrative *gain time*"—which the Florida Supreme Court has held is indistinguishable from provisional release credits—is triggered when prison population exceeds 98% of capacity). Nor does the Florida Attorney General appear to endorse this semantic distinction. *See* Butterworth Br. 1 ("[Provisional release credits] are widely regarded as a form of 'gain time,' a term for a variety of early release mechanisms . . ."). Finally, contrary to Respondent Mathis' contention, the clearest statement in the otherwise inconclusive legislative history demonstrates that the legislature considered all release credits to be types of "gain-time." *See* Senate Staff Analysis and Economic Impact Statment for SB 210 (rev. Mar. 7, 1989) (Lodg. Doc. 48) ("Florida law currently authorizes four different types of gain time: basic, incentive, meritorious, and provisional credits.").

on parole decision necessary to show Ex Post Facto violation).

A. Conspicuously absent from Respondents' briefs is any mention whatsoever of the statute governing Petitioner's release, § 921.001, Fla. Stat. (Supp. 1992). Respondents' failure to discuss this statute is telling, because the statute plainly demonstrates that provisional release credits ("PRC"), once awarded, were a central, mandatory determinant of the duration of the recipient's incarceration. Because Respondents' unsupported assertions may have confused the role of PRC in determining the length of Petitioner's incarceration, a careful step-by-step review of the actual governing statutes is necessary to clarify the requirements of the law of Florida during the relevant period. The contemporary statute governing the release of Florida prisoners from custody provided, in relevant part:

> A person who is convicted of a crime committed on or after October 1, 1983, but before October 1, 1988, *shall be released from incarceration* only:
>
> (a) Upon expiration of his sentence;
>
> (b) Upon expiration of his sentence as reduced by accumulated gain-time;
>
> (c) As directed by an executive order granting clemency; or
>
> (d) *Upon attaining the provisional release date.*

§ 921.001(10), Fla. Stat. (Supp. 1988) (Lodg. Doc. 12) (emphasis added).[6] The statutory language is clear and mandatory—a prisoner *shall* be released on his provisional release date. "Provisional release date," in turn, is defined in the provisional release credit statute:

> At such time as provisional credits are granted, the Department of Corrections *shall establish a provisional release date* for each eligible inmate incarcerated, which will be *the tentative release date less any provisional credits granted.*

[6] The text of Section 921.001(10), Fla. Stat. remained unchanged from 1988 to 1993.

§ 944.277(3), Fla. Stat. (Supp. 1992) (Lodg. Doc. 24) (Pet. Br. App. 3a) (emphasis added). Finally, the governing statute defines "tentative release date" as

> the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited as described in this [gain-time statute]. The initial tentative release date shall be determined by deducting basic gain-time granted from the maximum sentence expiration date. Other gain-time shall be applied when granted or restored to make the tentative release date proportionately earlier; and forfeitures of gain-time, when ordered, shall be applied to make the tentative release date proportionately later.[7]

§ 944.275(3)(a), Fla. Stat. (1987) (Lodg Doc. 17). Together, the three quoted statutes make clear the formula mandated by Florida law for determining the duration of a prisoner's incarceration: A prisoner's mandatory release date is determined by the guideline sentence imposed by the sentencing judge, less all gain-time he has been awarded, including provisional release credits and all other overcrowding gain-time. The interaction of the three statutes also shows the integrated nature of the several component determinants of the length of punishment under the Florida system. The statutory sentence range, the sentencing guidelines, and all forms of gain-time operated together as part of an organic whole to determine the length of an offender's incarceration.[8]

[7] The statute later provides that gain-time may be forfeited by prison administrators "[w]hen a prisoner is found guilty of an infraction of the laws of this state or the rules of the department [of corrections]." § 944.275(5), Fla. Stat. (1985 & 1993) (Lodg. Doc. 14, 15); *see* § 944.28. Petitioner committed no such infraction, and Respondents do not here contend that gain-time credits awarded under Section 944.275 were forfeited or rescinded. At issue in this case is the legislative withdrawal of Petitioner's provisional release gain-time credits.

[8] The futility of Respondents' attempt to differentiate between the several integrated statutory determinants of punishment under Florida law is illustrated by the inconsistent arguments of Respondent Mathis. Superintendent Mathis first states that under applicable Florida law, "an offender's actual prison penalty—that is, his

Contrary to Respondents' contention, the provisional release date was not a mere "forecast," it was a non-discretionary, mandatory release date. A careful reading of the relevant statutes reveals that the only contingent or "provisional" feature of provisional release credits was whether they would be granted in the first instance.[9] Once the state decided to award the credits, there was no statutory provision for their revocation under any circumstances. There is simply no support in Florida statutes, or relevant legislative history, for the notion that the state retained discretion to withdraw previously granted provisional release credits if overcrowding should subside.[10]

To be sure, consistent with the Ex Post Facto Clause, the state *could have* created an early release system that prospectively reduced the duration of incarceration only so long as overcrowding persisted. Indeed, in 1989 (effective 1990) the Florida Legislature incorporated into its sentencing system just such a mechanism, entitled "control release," which expressly provides for the adjustment of prisoners' release dates for a variety of reasons, including changes in overcrowding. *See* § 947.146(6)(a)(3), Fla. Stat. (1989). The statute—which remains in effect today

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punishment—was calculated as the actual sentence less the award of *mandatory* gain-time." Mathis Br. 32 (emphasis added). Applying this formula, Mathis continues, Petitioner's "22-year sentence became roughly a 15-year sentence." *Id.* at 32 n.37. On the very next page, Mathis reverses field, claiming that "petitioner cannot show that the punishment for his crimes on the date he committed them was something less than the 22 years to which he was actually sentenced." *Id.* at 33.

[9] Mathis makes much of the fact that the Legislature named the gain-time credits at issue here *provisional* release credits, suggesting without any citation to authority that the mere name of the credits makes such credits insubstantial and ephemeral. Mathis Br. 33. As this Court has made abundantly clear, the label the government affixes to a statute does not immunize it from Ex Post Facto scrutiny. *See, e.g., Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990).

[10] There is no dispute that, absent the 1992 Act, Petitioner's provisional release date was October 1, 1992, the date he was actually released.

—gave the state the prison population management flexibility it desired. Importantly, the change to the sentencing system effected by Section 947.146 does not offend the Ex Post Facto Clause so long as the government applies it prospectively, *i.e.*, so long as it applies only to persons who commit offenses after the statute's effective date. In contrast, what the government may *not* do is what it did to Petitioner—enact a law that increases retroactively the duration of his incarceration for the same offense. *See Miller* v. *Florida*, 482 U.S. 423 (1987); *see also Morales*, 115 S. Ct. at 1603 n.4 (ex post facto analysis of adjustments to mechanisms surrounding sentencing process focuses on whether those adjustments increased prisoner's term of confinement).

Respondents cannot seriously dispute that an increase in the duration of incarceration is an increase in the quantum of punishment. Incarceration—the deprivation of liberty—is, and always has been, the primary form of punishment societies mete out for serious crime. With the exception of capital cases, the crux of virtually every Ex Post Facto case is a claim that the challenged government action had the effect or potential effect of increasing the length of the claimant's term of incarceration. *See, e.g., Morales*, 115 S. Ct. 1597 (petitioner complained that less frequent parole hearings reduced his potential for a shorter term of incarceration through parole).

B. The only distinction between this case and the *Lindsey-Weaver-Miller* trilogy is that the retroactive punishment in this case is more clear, more definite, and more onerous. In *Lindsey*, the statutory change eliminated the low end of the range of incarceration terms that could be imposed for specific crimes. In *Weaver*, the State of Florida reduced the number of gain-time credits that a prisoner was eligible to receive after the effective date of the new statute. In each case, it was possible that the duration of the prisoner's sentence would have been the same under the amended statute as under the statute in effect at the time of his offense. Nonetheless, in both cases the Court held the statutory change violated the Ex Post Facto

Clause. Here, unlike *Lindsey* and *Weaver*, there is no question that the 1992 Act actually increased Petitioner's term of incarceration.

Florida's action in *Miller* is closer to the retroactive change it imposed in the present case. In *Miller*, the state changed the presumptive sentencing range for the petitioner's crime from 3½-4½ years to 5½-7 years. The Court held that this post-offense increase in the "quantum of punishment" violated the Ex Post Facto Clause. *Miller*, 482 U.S. at 433-34. Here, Florida seeks to achieve the same result it achieved in *Miller* by retroactively "adjusting" a different determinant of the duration of his sentence. The result here differs only in its certainty and severity. In *Miller*, the offender faced the *possibility* of an increased sentence of as much as 3½ years (new maximum of seven years less old minimum of 3½). Here, Florida imposed—through the 1992 Act—a *certain* increase in incarceration of more than five years.

III. RESPONDENTS' NEWFOUND ARGUMENT THAT PETITIONER IS NOT ENTITLED TO THE PROTECTION OF THE EX POST FACTO CLAUSE IS BARRED BY THEIR FAILURE TO RAISE IT BELOW; REGARDLESS, IT MISAPPREHENDS BOTH PETITIONER'S CLAIM AND EX POST FACTO LAW.

Respondents raise for the first time in their merits briefs the new argument that the State's retroactive cancellation of Petitioner's early release gain-time credits and the resultant increase in the duration of his incareation is immune from ex post facto scrutiny because the version of the statute under which Petitioner received credits was not in effect at the time of his offense. *See* Mathis Br. 26-30; Butterworth Br. 14-19. Never before in this case, including Respondents' Opposition to Certiorari, have Respondents raised this argument for any court's consideration. Only after the magistrate judge, the district court, and the Eleventh Circuit had ruled, and after this Court granted certiorari, did Respondents see fit to raise this hypertechnical argument drawing distinctions between one

early release statute and the virtually indistinguishable statutes that served as its functional replacements.

A. This belated argument is not properly before the Court, and the Court should follow its sound general practice of refusing to hear arguments raised for the first time in this Court. The Court generally does not address arguments that were not the basis for the decision of the courts below. *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996). This is particularly true where, as here, the issue involves a question of state law. *See Peralta* v. *Heights Medical Ctr., Inc.*, 485 U.S. 80, 86 (1988). Principles of judicial efficiency, fairness and notice, and inter-system comity militate against allowing Respondents to decline to make this argument before the lower courts, only to raise it for the first time after this Court has granted certiorari, in an attempt to divert the Court from the merits of Petitioner's ex post facto challenge.[11]

B. Even if the Court departs from its general policy and considers Respondents' new argument, the Florida Supreme Court has already resolved the state law issue in Petitioner's favor. As Respondents themselves insist, the interpretation and application of state penal law, including all early release gain-time statutes, is the province of the state judiciary. *See* Mathis Br. 34-38. The state law question of whether there was any relevant substantive difference between emergency gain-time and the two overcrowding release credit statutes that succeeded it is properly decided by Florida state courts. The Florida Supreme Court has decided several ex post facto cases

[11] Exactly four years have elapsed since Petitioner's October 1992 release. As a result of the 1992 Act, Petitioner has spent nearly 3½ of those years in prison. As this Court recently noted, "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights." *Stutson* v. *United States*, 116 S. Ct. 600, 603 (1996). Such "solicitude" is particularly appropriate where, as here, the government allows a case to work its way through the system and then raises an entirely new argument for the first time after this Court has granted certiorari.

arising in the same temporal circumstances, *i.e.*, a prisoner whose offense date pre-dated the enactment of provisional release credits challenging the State's treatment of provisional release credits. In each case, the Florida Supreme Court decided the ex post facto challenge to cancellation of provisional release credits or administrative gain-time. *See, e.g., Griffin* v. *Singletary*, 638 So. 2d 500 (Fla. 1994) (inmate's offense date was prior to enactment of provisional release credits and administrative gain-time statutes, court decided ex post facto challenge to retroactive cancellation of both types of gain-time)[12]; *Ipnar* v. *Singletary*, No. 81,040 (Fla. Apr. 29, 1993)[13]; *see also Herring* v. *Singletary*, 879 F. Supp. 1180 (N.D. Fla. 1995) (petitioner committed offense in 1984, court

[12] In *Griffin* v. *Singletary*, 638 So. 2d 500 (Fla. 1994), a prisoner sentenced in 1986, when emergency gain-time was the only type of overcrowding credit available, challenged the revocation of provisional release credits awarded under the successor statute also at issue in this case. The Court proceeded directly to the question of whether the revocation of provisional credits violated the Ex Post Facto Clause, pausing briefly to note that " 'provisional credits' and 'administrative' gain-time are the same for [ex post facto] purposes . . . The sole purpose of both forms was to reduce prison overcrowding when the correctional system reached ninety-eight percent of its lawful capacity." *Id.* at 501. The Court further noted that although provisional credits were not technically referred to as "gain-time," "the distinction lacks a difference, if only because the two are different names applied to essentially the same thing." *Id.* at 501 n.1.

[13] In *Ipnar*, Respondent Singletary raised the very timing argument he has raised belatedly in this case. *See* Respondent Singletary's Response to Petition for a Writ of Habeas Corpus at 24, *Ipnar* v. *Singletary*, No. 81,040 (Fla. Apr. 29, 1993). Mr. Ipnar committed his offense in 1985, and he challenged the revocation of his provisional release credits. Respondent Singletary argued that Ipnar could not challenge the revocation of provisional release credits because the statute providing for that version of credits was enacted after Ipnar had committed his crime and been convicted and sentenced. *See id.* In an unpublished memorandum opinion, the Florida Supreme Court declined to address this argument, instead proceeding directly to reject Ipnar's ex post facto challenge to the cancellation of provisional release credits. *See* slip op., *Ipnar* v. *Singletary*, No. 81,040 (Fla. Apr. 29, 1993).

decided ex post facto challenge to 1992 revocation of provisional release credits, enacted in 1988). Like federal courts, the Florida Supreme Court will reach a constitutional question only if the case cannot be decided on statutory or other non-constitutional grounds. *Florida* v. *Tsavaris*, 394 So. 2d 418, 421 (Fla. 1981); *see Florida* v. *Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995).[14]

Moreover, even if the Florida Supreme Court had not resolved the issue—which it has—there is no relevant substantive difference between the succeeding versions of overcrowding gain-time. As demonstrated in Respondents' briefs, provisional release credits were part of a series of "overcrowding gain-time" mechanisms created by Florida to respond to the excess of prisoners over prison space. *See* Mathis Br. 3-9; Butterworth Br. 2-7. The three successive statutes in effect during the relevant period all provided for the discretionary award of gain-time when the Florida prison population reached 98% of capacity.[15]

[14] In *Tsavaris*, the petitioner contended that because the Florida Supreme Court had not expressly addressed the application and meaning of the statutory term "interception" in a prior decision regarding the constitutionality of a statute as applied, the Court had not decided the question in the prior case. *Tsavaris*, 394 So. 2d at 421. After acknowledging that the prior decision had not expressly addressed the statutory interpretation question, the *Tsavaris* Court rejected petitioner's attempt to distinguish the prior case, holding "had this Court believed that [the activity at issue in the prior case] did not fit within the term 'interception,' *we most certainly would have decided the case on those grounds*, for the Court will not pass upon a constitutional issue if the case can be decided on other grounds." *Id.* (emphasis added).

[15] Respondent Mathis misstates the relevant statutory parameters in his attempt to dismiss the fact that Florida prisons reached the 98% statutory trigger a month before Petitioner's sentencing. Mathis Br. 28 n.34 (claiming, without citation, that the statutory trigger at the time of sentencing was 99%). At the time Lynce committed the offense, at the time of his plea, and at the time he was sentenced, the statutory trigger for overcrowding credits was 98% of capacity. *See* § 944.598(1), Fla. Stat. (1985) (Lodg. Doc. 27). It was not until after Petitioner was incarcerated that Florida changed the trigger percentage for one type of overcrowding gain-time ("emergency gain-time") to 99%. *See* § 944.598(1), Fla. Stat. (Supp. 1986) (Lodg. Doc. 29).

Only the name and the technical operation of the early release mechanisms changed as one mechanism supplanted its predecessor between 1986 and 1988.[16] The substantive core remained constant—overcrowding credits, when awarded, operated in conjunction with the Florida sentencing guidelines to create a mandatory release date. *See* §§ 921.001, 944.275, 944.277, Fla. Stat. (Supp. 1988) (Lodg. Doc. 11, 17, 19); § 944.276, Fla. Stat. (1987) (Lodg. Doc. 17-18); § 944.598, Fla. Stat. (1985) (Lodg. Doc. 19-21). Florida's changes in the mechanics of awarding gain-time credit in 1987 and 1988 did not violate the Ex Post Facto Clause precisely *because*, with respect to Petitioner, they effected no substantive change in the law. *Compare Waldrup* v. *Dugger*, 562 So. 2d 687 (Fla. 1990) (application of successor gain-time statute to reduce DOC discretion to grant gain-time under statute in effect at time of offense violates ex post facto prohibition) *with Morales*, 115 S. Ct. at 1603 (mechanical changes to sentencing and release procedures are permitted by the Ex Post Facto Clause).[17]

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[16] Respondents' argument that emergency release credits were limited to 30 total days per inmate also misreads the statute. Under the statute, DOC was required to declare a state of emergency, triggering eligibility for the award of emergency credits, "*whenever* the population of the [Florida] correctional system exceeds 98 percent of [its] lawful capacity." § 944.598(*1*), Fla. Stat. (1985) (Lodg. Doc. 27) (emphasis added). If emergency release credits and resulting releases of prisoners were inadequate to bring the prison population below 98% of capacity, DOC would be required to declare another emergency, triggering new eligibility for emergency gain-time. Under the statute, such successive awards of emergency gain-time could occur each time the prison population exceeded 98% of capacity.

[17] Unlike the 1992 Act, the mechanical changes to overcrowding gain-time in 1987 and 1988 made no significant substantive changes. The Florida Legislature also amended the provisional release credits statute in 1989 to add offense-based eligibility exclusions. *See* § 944.277(1)(i) & n.2, Fla. Stat. (1989) (Lodg. Doc. 21). This was the first time since the creation of the system in 1983 that attempted murderers were excluded from eligibility for any type of gain-time. However, because those exclusions expresaly applied prospectively only, they had no substantive effect for prisoners like Petitioner, who committed offenses prior to their enactment. *See id.*

C. Respondents' expectation/reliance argument depends on the erroneous premise that the Ex Post Facto Clause proscribes only laws that thwart a prisoner's subjective expectation at the time of his offense regarding the length of his incarceration. *See* Mathis Br. at 26-30. This crabbed conception is contrary to an unbroken line of this Court's cases stretching to the founding of the Republic, holding that the Ex Post Facto Clause prohibits laws that " 'retroactively . . . increase the punishment for criminal acts.' " *Morales*, 115 S. Ct. 1597, 1601 (1995) (quoting *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990)). The crux of the inquiry is not what a prisoner actually expected—or even what he might reasonably have expected—at the time of sentencing, but rather whether the challenged statute has the effect of increasing the quantum of punishment attached to a crime. *E.g.*, *Miller* v. *Florida*, 482 U.S. 423, 432 (1987).

Respondents' expectation/reliance argument misses the mark for two reasons. First and foremost, reliance is merely one of the *interests* protected by the Ex Post Facto Clause, not a precondition to its application or a necessary *element* of an Ex Post Facto claim.[18] Indeed,

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[18] Respondents correctly recognize that one of the several interests protected by the Ex Post Facto Clause is a general reliance *interest*. *See Miller*, 482 U.S. at 430 (*Calder* found that one purpose of the Ex Post Facto Clause was to ensure that "legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' ") (quoting *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981)). Although reliance is one interest protected by the Clause, actual reliance has never been held to be a necessary element of an Ex Post Facto claim. With respect to changes in punishment, the test has always been based on effects, *viz.*, whether a law retroactively changes the quantum of punishment attached to a crime. *See, e.g.*, *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990) (original understanding of Ex Post Facto Clause was that "Legislatures may not retroactively . . . increase the punishment for criminal acts"). Moreover, contrary to Respondents' apparent belief, this Court has never held that a Petitioner must show actual subjective reliance in order to demonstrate

reliance is not even the primary interest protected by the prohibition against ex post facto laws. The Framers' primary intention in including the Ex Post Facto Clause in the Constitution was to prevent federal and state legislatures from enacting arbitrary or vindictive legislation. *See Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 389, 396 (1798). Thus, even if the 1992 Act had not invaded the reliance and fair warning interests of Petitioner and similarly situated offenders, its retroactive increase in the punishment for selected crimes would still violate the Ex Post Facto Clause. *Id.*; *see Morales*, 115 S. Ct. 1597.

Second, the 1992 Act did violate the objective reliance interests of Petitioner and similarly situated offenders. At the time of Petitioner's offense and at the time of his plea and sentencing, the law of Florida provided that, under certain conditions, prisoners would receive overcrowding gain-time credits. *See* § 944.598, Fla. Stat. (1985) (Lodg. Doc. 27). Once awarded, those credits would reduce the duration of the recipient's incarceration. *Id.* Absent some violation of the law or prison rules by the recipient, credits awarded were irrevocable. Although the mechanics and procedures for the award of overcrowding gain-time credits changed slightly over time, the basic substance of overcrowding gain-time remained constant. Thus, throughout the seven years at issue in this case (1985 to 1992), Florida prisoners had an objectively reasonable expectation that under certain conditions they would receive early release credits that would reduce the length of their incarceration, and that those credits, once awarded, would not be revoked based on the recipient's original offense of conviction.

The 1992 Act frustrated the reasonable expectations of Petitioner Lynce and nearly 3000 other Florida prisoners by canceling retroactively gain-time credits awarded in accordance with the statutory scheme described above. At least 135 of those prisoners were returned to prison after having been released in accordance with the gain-

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that a retroactive change in the law infringed the reasonable reliance interests protected by the Ex Post Facto Clause.

time statutes.[19] Without fair warning, the 1992 Act violated reasonable reliance and expectation interests created by Florida penal statutes and retroactively increased the punishment of nearly 3000 prisoners.

IV. PRISON ADMINISTRATION CASES HAVE NO APPLICATION TO FLORIDA'S LEGISLATIVE DECISION RETROACTIVELY TO INCREASE THE SUBSTANTIVE PUNISHMENT ATTACHED TO PETITIONER'S OFFENSE.

Respondent Attorney General Butterworth and *amici* states (hereinafter collectively referred to as the "Attorney General") urge that states' prison management concerns require deference to a state's decision to deprive a citizen of basic constitutional rights. *See* Butterworth Br. 26-30; States' Br. 12-15. For good reason, this Court has never held that a state's prison management interests allow it greater latitude retroactively to increase the punishment attached to a crime. For several equally good reasons, this Court should resist Respondents' invitation to dilute the Ex Post Facto Clause's protections against arbitrary deprivations of liberty.

First, unlike all of the cases cited by the Attorney General, which involve the government's rules and regulations governing persons in custody, this case involves the prior determination of whether the government lawfully may continue to incarcerate the Petitioner. *See Turner* v. *Safely*, 482 U.S. 78 (1987) (prison regulation limiting inmates' exercise of First Amendment rights while in prison); *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (same). As these cases note, the day-to-day management of prisons is a difficult and complicated endeavor, and deference to administrators' judgment in such matters is both necessary and appropriate. However, the threshold determination of whether the state may incarcerate a citizen is not a matter of day-to-day prison administration, but a legal

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[19] *See* Letter from Florida Dep't of Corrections (July 9, 1996), Appendix A to Brief of Amicus Curiae Florida Public Defender Association, Inc.

question that falls outside the competence and jurisdiction of prison administrators.[20] Tellingly, the Respondent most competent to address prison management concerns, Corrections Superintendent Mathis, does not make this argument.

Second, the exception the Attorney General advocates would swallow not only the Ex Post Facto Clause, but virtually every other constitutional right of prisoners, while simultaneously eroding ordinary citizens' protections against arbitrary government deprivation of liberty. The Attorney General effectively argues that, to facilitate prison "administration," prison officials and state legislatures should be given complete discretion to increase punishment retroactively, so long as that increase is rationally related to a legitimate penological interest.

The primary penological interest the Attorney General asserts in support of the cancellation of early release credits is protection of public safety. *See* States' Amicus Br. 14-16; Butterworth Br. 28-29. In virtually every ex post facto challenge, the government's action is rationally related to the protection of public safety. For example, few would deny that decisions to incarcerate convicted felons Miller, Weaver, and Lindsey for a longer period of time than that prescribed at the time of their offenses were rationally related to the protection of public safety. Similarly, a government "administrative" decision to execute all prisoners previously convicted of violent crimes would be rationally related to the goal of protecting gen-

[20] The Attorney General suggests that the Court should give the same degree of deference to legislative acts aimed at prison administration. Butterworth Br. 27-28 (citing *Turner* dicta). Even assuming, *arguendo*, that legislatures are entitled to the same type of deference as executive branch administrators, this argument misses the point. Government actions that deprive a citizen of liberty retroactively have nothing to do with prison management or administration, and deference to such actions is not appropriate. *Cf. Collins*, 497 U.S. at 46 (constitutional prohibition of ex post facto laws is aimed at laws " 'whatever their form' " that increase retroactively the punishment for an offense) (citing *Beazell* v. *Ohio*, 269 U.S. 167 (1925)).

eral public safety. However, numerous constitutional protections, including the Ex Post Facto Clause, prohibit such government actions, regardless of whether they bear a rational relation to the protection of public safety.

Third, what Florida is really seeking is an unnecessary waiver of a federally guaranteed constitutional right, in order to fix a resource problem of its own making, which is well within the state's existing power to address. Prison "overcrowding" is not primarily the result of an Act of God or some other exogenous force outside of the state's control.[21] The surplus of prisoners over prison space—"overcrowding"—results from the State's refusal to allocate the additional fiscal resources necessary to accommodate the inevitable increase in prison population created by its punishment decisions. As Respondents acknowledge, this "overcrowding crisis" is not new. *See, e.g.*, Butterworth Br. 3-4 (prison overcrowding crisis has existed since at least the early 1970s). Florida cannot argue at this juncture that overcrowding took it by surprise in the late 1980s.[22]

* * * *

[21] Prison population growth is primarily the gradual and predictable result—maybe even the intended result—of a series of deliberate legislative decisions regarding crime and punishment, including the definition of crimes and increases in the duration of incarceration attached to those crimes. *See, e.g.*, 1988 Fla. Laws ch. 88-131 (expanding habitual offender laws, creating new 15-year mandatory minimum sentences, creating prison sentences for all felonies, including lesser felonies previously subject to non-prison penalties); 1987 Fla. Laws ch. 87-110; 1986 Fla. Laws ch. 86-273, § 1 ("The extent of departure [from sentence prescribed by sentencing guidelines] shall not be subject to appellate review."). Overcrowding occurs when a government is unwilling to pay to construct and maintain sufficient prison space to house the growing prison population resulting from those decisions. While this reluctance is understandable, it cannot justify violation of the Ex Post Facto Clause.

[22] During the 1990s, Florida decided to devote greater resources to new prison construction. As a result, Florida's prison overcrowding crisis has subsided and Florida actually has significant excess prison capacity. *See, e.g.*, Florida Parole Commission Con-

The 1992 Act retroactively increased the punishment prescribed for Petitioner's crime by withdrawing previously awarded early release credits and revoking a statutorily prescribed mandatory release date, based solely on his 1985 offense of conviction. As a result of this retroactive statutory change, Petitioner was reincarcerated for an additional five years. This selective retroactive increase in punishment is prohibited by the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed and the Petition for Writ of Habeas Corpus should be granted.

Respectfully submitted,

Of Counsel:
CARTER G. PHILLIPS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

H. JAY STEVENS
JOEL T. REMLAND *
Federal Public Defender
Middle District of Florida
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338

Counsel for Petitioner

* Counsel of Record

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trol Release Weekly Advancement Report (July 3, 1996) (reporting 5369 vacant prison beds, or approximately 8% excess capacity).